Sreesanthan a/l Eliathamby v Suruhanjaya Sekuriti Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-17–05 OF 2024 (W)
HASNAH HASHIM CJ (MALAYA), ABDUL KARIM AND VAZEER ALAM FCJJ
26 AUGUST 2025

Securities — Insider trading — Specific confidential information — Whether civil action by Securities Commission against offender for carrying out insider trading contrary to Securities Industry Act 1983 ('the SIA') did not require Attorney-General's consent — Whether such action was not 'proceedings for an offence' under art 145(3) of the Federal Constitution — Whether civil action under s 89E of the SIA did not require proof that offender intended to use inside information he had acquired — Whether it was sufficient to show insider knew or ought to have known he was in possession of price-sensitive information that was not generally available and during a material period had bought or sold shares of company which was the subject-matter of such information

The High Court had allowed the respondent's action against the appellant for insider trading involving the acquisition and sale for profit of 600,000 shares in a public-listed company contrary to s 89E(2)(a) of the Securities Industry Act 1983 ('the SIA'). Pursuant to s 90A of the SIA, the appellant was ordered to pay RM1,989,402 to the respondent and was barred from being a director of any public-listed company for ten years. The Court of Appeal ('COA') unanimously affirmed the High Court's decision and dismissed the appellant's appeal. The appellant raised three issues in his instant appeal against the COA's decision: (a) whether breach of s 89E of the SIA (now s 188 of the Capital Markets and Services Act 2007) was a matter of strict liability in that it was sufficient to prove that the appellant had inside information that was not generally available; or was it necessary to show that he knew or ought reasonably to have known that the information in his possession was not generally available; or whether in addition to knowing that the information was not generally available, it must also be proven that he intended to use the said information; (b) whether in determining the materiality of the information in the appellant's possession, the court should only consider facts and circumstances that existed at the time the impugned securities were acquired or whether facts and circumstances that occurred post-acquisition should also be considered; and (c) whether the consent of the Attorney General ('AG') was required to commence a civil action under ss 90 and 90A(5) of the SIA so that an action that did not have such consent was unconstitutional. With regards to the three issues, the courts below held that: (i) s 89E of the SIA did not impose strict liability; (ii) s 89E(1) required mental element (mens rea)

to be shown in that the insider knew or ought reasonably to have known that the information in his possession was not generally available; (iii) on the facts, the appellant knew that the inside information he had was not generally available; (iv) s 89E(1) of the SIA did not require proof that the appellant intended to use the inside information; (v) the information in the appellant's possession was material because publication of the proposed privatisation of the public-listed company saw a sharp increase in the company's share price — a consequence that was reasonably foreseeable; and (vi) the civil action against the appellant did not require the AG's consent because the action did not amount to 'proceedings for an offence' within the meaning of art 145(3) of the Federal Constitution.

Held, unanimously dismissing the appeal and affirming the decisions of the courts below:

(1) (**per Hasnah Hashim CJ (Malaya)**) The AG's prosecutorial powers under art 145(3) of the Federal Constitution ('the FC') did not extend to civil proceedings brought under s 90A(5) of the SIA or for contravention of s 89E of the SIA. Hence, such civil action did not require the AG's consent before they were instituted (see paras 32 & 44).

(2) (**per Hasnah Hashim CJ (Malaya)**)The definition of 'offence' in the Criminal Procedure Code ('the CPC') did not have the effect of expanding the term 'proceedings for an offence' in art 145(3) of the FC to include non-criminal matters. Neither did s 3 of the CPC intend the creation of the novel concept of 'civil offences' or 'civil prosecutions'. Thus, the definition of 'offence' as provided under the CPC related only to criminal offences and did not include civil actions. The AG's powers under art 145(3) of the FC were crystal clear and applied only to prosecutions and proceedings for criminal offences and did not extend to civil actions brought under s 90A(5) of the SIA (see para 43).

(3) (**per Hasnah Hashim CJ (Malaya)**) Whilst the AG, as the guardian of public interest, could apply to intervene in civil actions where public interest was concerned, this did not mandate that the AG's consent was necessary in order to initiate such civil actions. The existence of the element of public interest did not mean a civil action fell within the definition of 'proceedings for an offence' under art 145(3) of the FC (see para 41).

(4) (**per Hasnah Hashim CJ (Malaya)**) It was untenable to expand the reading of the term 'proceedings for an offence' in art 145(3) of the FC to include civil proceedings under s 90A(5) of the SIA because: (a) 'offence' in the FC consistently referred to criminal offences for which a person was charged, convicted and sentenced or was acquitted; (b) the courts had consistently interpreted 'any proceedings for an offence' in the specific context of art 145(3) of the FC to refer to criminal prosecutions

and proceedings for criminal offences; (c) the appellant's interpretation of 'proceedings for an offence', if accepted, would have far-reaching effect on civil actions and other statutory regimes of similar nature; (d) unlike a criminal offence for which there was no time bar, a civil claim under s 90 of the SIA had a statutory time-bar of 12 years from the date on which the cause of action accrued as stated in s 90(5); (e) non-payment of a judgment sum ordered to be paid or penalty imposed by the court for a claim under s 90A(5) of the SIA was a civil debt which had to be enforced in the usual way a money judgment would be enforced; (f) unlike a fine or penalty imposed in a criminal proceeding, the manner in which the amount recovered by the respondent in an action under s 90(5) or (6) of the SIA was dealt with was uniquely different as stipulated in s 90(7), (8) and (9) of the SIA (see para 42).

(5) (**per Vazeer Alam FCJ, supporting**) There was no merit in the appellant's submission that s 89E(1) of the SIA required proof of intention to use the information. Following the amendment to s 89 by the Securities Industry (Amendment) Act 1998, it was no longer necessary for the respondent to establish the element of 'improper use of information' by the offending insider. Post-amendment, it was only necessary to show that the offending insider had in his possession price-sensitive information that was not generally available and that during the material period in question, he had acquired or disposed of shares in the company which was the subject of the information (see paras 65 & 69).

(6) (**per Vazeer Alam FCJ, supporting**) Section 89E of the SIA did not create a strict liability offence. Instead, s 89E(1)(b) of the SIA required that an accused or defendant knew or ought reasonably to have known that the information in question was not generally available. This knowledge constituted the mens rea element of the insider trading prohibition and the courts had to determine this objectively based on the available evidence (see para 78).

(7) (**per Vazeer Alam FCJ, supporting**) In determining the materiality of information in the possession of an insider, as defined in s 89B of the SIA, the court shall not merely confine itself to the facts and circumstances occurring at the time of any impugned acquisition or trade of securities but should also take into consideration facts and circumstances occurring after the time of such impugned acquisition or trade (see para 89).

[Bahasa Malaysia summary

Mahkamah Tinggi telah membenarkan tindakan responden terhadap perayu berhubung dengan dagangan orang dalam yang melibatkan pemerolehan dan penjualan untuk keuntungan sebanyak 600,000 saham dalam sebuah syarikat tersenarai awam yang adalah bertentangan dengan s 89E(2)(a) Akta

Perindustrian Sekuriti 1983 ('APS'). Selaras dengan s 90A APS, perayu telah diperintahkan membayar sejumlah RM1,989,402 kepada responden dan telah dihalang daripada menjadi pengarah mana-mana syarikat tersenarai awam untuk tempoh sepuluh tahun. Mahkamah Rayuan ('MR') secara sebulat suara telah mengekalkan keputusan Mahkamah Tinggi dan menolak rayuan perayu. Perayu telah membangkitkan tiga isu dalam rayuan semasa terhadap keputusan MR, iaitu: (a) sama ada pelanggaran s 89E APS (kini s 188 Akta Pasaran Modal dan Perkhidmatan 2007) merupakan satu perkara tanggungan keras di mana ia adalah mencukupi untuk membuktikan bahawa perayu mempunyai maklumat dalaman yang tidak tersedia secara umum; atau adakah ia perlu dibuktikan bahawa beliau mengetahui atau sepatutnya secara munasabah mengetahui bahawa maklumat yang berada dalam pemilikannya adalah tidak tersedia secara umum; atau sama ada selain daripada mengetahui bahawa maklumat tersebut tidak tersedia secara umum, mestilah juga dibuktikan bahawa beliau berniat untuk menggunakan maklumat tersebut; (b) sama ada dalam menentukan kesahan maklumat dalam pemilikan perayu, mahkamah hanya boleh mempertimbangkan fakta dan keadaan yang wujud pada masa sekuriti yang dipertikai diperoleh atau sama ada fakta dan keadaan yang berlaku selepas pemerolehan juga boleh diambil kira; dan (c) sama ada persetujuan Peguam Negara ('PN') diperlukan untuk memulakan tindakan sivil di bawah ss 90 dan 90A(5) APS supaya tindakan yang tidak mempunyai persetujuan tersebut adalah tidak berperlembagaan. Berhubung dengan ketiga-tiga isu tersebut, mahkamah-mahkamah di peringkat bawah telah memutuskan bahawa: (i) s 89E APS tidak memperuntukkan tanggungan keras; (ii) s 89E(1) memerlukan elemen mental (mens rea) ditunjukkan iaitu orang dalam mengetahui atau sepatutnya secara munasabah mengetahui bahawa maklumat yang berada dalam pemilikannya tidak tersedia secara umum; (iii) berdasarkan fakta, perayu mengetahui bahawa maklumat dalaman yang beliau miliki adalah tidak tersedia secara umum; (iv) s 89E(1) APS tidak memerlukan pembuktian bahawa perayu berniat menggunakan maklumat dalaman tersebut; (v) maklumat dalam pemilikan perayu adalah material kerana pengumuman mengenai cadangan penswastaan syarikat tersenarai awam tersebut telah mengakibatkan kenaikan mendadak harga saham syarikat berkenaan — satu akibat yang boleh dijangka secara munasabah; dan (vi) tindakan sivil terhadap perayu tidak memerlukan persetujuan PN kerana tindakan tersebut tidak merupakan 'prosiding bagi suatu kesalahan' dalam maksud perkara 145(3) Perlembagaan Persekutuan.

Diputuskan, secara sebulat suara menolak rayuan dan mengekalkan keputusan mahkamah-mahkamah di peringkat bawah:

(1) (**oleh Hasnah Hashim HB (Malaya)**) Kuasa pendakwaan PN di bawah perkara 145(3) Perlembagaan Persekutuan ('PP') tidak meliputi prosiding sivil yang dibawa di bawah s 90A(5) APS atau bagi pelanggaran s 89E APS. Maka, tindakan sivil sedemikian tidak memerlukan

persetujuan PN sebelum dimulakan (lihat perenggan 32 & 44). A

(2) (**oleh Hasnah Hashim HB (Malaya)**) Tafsiran 'kesalahan' dalam Kanun Tatacara Jenayah ('KTJ') tidak mempunyai kesan memperluas istilah 'prosiding bagi suatu kesalahan' dalam perkara 145(3) PP untuk merangkumi perkara bukan jenayah. Seksyen 3 KTJ juga tidak berniat mewujudkan konsep baharu 'kesalahan sivil' atau 'pendakwaan sivil'. Oleh itu, takrifan 'kesalahan' di bawah KTJ hanya terpakai bagi kesalahan jenayah dan tidak termasuk tindakan sivil. Kuasa AG di bawah perkara 145(3) PP adalah jelas dan hanya terpakai bagi pendakwaan serta prosiding bagi kesalahan jenayah, dan tidak meliputi tindakan sivil di bawah s 90A(5) APS (lihat perenggan 43). B C

(3) (**oleh Hasnah Hashim HB (Malaya)**) Walaupun PN, sebagai penjaga kepentingan awam, boleh memohon untuk campur tangan dalam tindakan sivil yang melibatkan kepentingan awam, hal ini tidak mewajibkan persetujuan PN bagi memulakan tindakan sivil sedemikian. Kewujudan unsur kepentingan awam tidak bererti sesuatu tindakan sivil termasuk dalam definisi 'prosiding bagi suatu kesalahan' di bawah perkara 145(3) PP (lihat perenggan 41). D

(4) (**oleh Hasnah Hashim HB (Malaya)**) Ia adalah tidak wajar untuk memperluaskan tafsiran istilah 'prosiding bagi suatu kesalahan' dalam perkara 145(3) PP untuk merangkumi prosiding sivil di bawah s 90A(5) APS kerana: (a) 'kesalahan' dalam PP secara konsisten merujuk kepada kesalahan jenayah yang mana seseorang dituduh, disabit dan dihukum atau dilepaskan; (b) mahkamah secara konsisten menafsirkan 'apa-apa prosiding bagi suatu kesalahan' dalam konteks khusus perkara 145(3) PP sebagai merujuk kepada pendakwaan jenayah dan prosiding bagi kesalahan jenayah; (c) tafsiran perayu mengenai 'prosiding bagi suatu kesalahan', jika diterima, akan membawa kesan luas terhadap tindakan sivil dan rejim statutori lain yang seumpamanya; (d) berbeza dengan kesalahan jenayah yang tiada had masa, tuntutan sivil di bawah s 90 SIA mempunyai had masa statutori 12 tahun dari tarikh kausa tindakan timbul sebagaimana diperuntukkan dalam s 90(5); (e) kegagalan membayar jumlah penghakiman yang diperintahkan atau penalti yang dikenakan oleh mahkamah bagi tuntutan di bawah s 90A(5) SIA adalah hutang sivil yang perlu dikuatkuasakan sebagaimana penghakiman wang lazimnya dikuatkuasakan; (f) berbeza dengan denda atau penalti dalam prosiding jenayah, cara jumlah yang diperoleh oleh responden dalam tindakan di bawah s 90(5) atau (6) SIA diuruskan adalah unik sebagaimana diperuntukkan dalam s 90(7), (8) dan (9) SIA (lihat perenggan 42). E F G H I

(5) (**oleh Vazeer Alam HMP, menyokong**) Tiada merit dalam hujahan perayu bahawa s 89E(1) APS memerlukan pembuktian niat untuk menggunakan maklumat tersebut. Selepas pindaan kepada s 89 melalui

Akta (Pindaan) Perindustrian Sekuriti 1998, ia tidak lagi perlu bagi responden membuktikan elemen 'penggunaan tidak wajar maklumat' oleh orang dalam yang bersalah. Pasca pindaan, ia adalah memadai untuk menunjukkan bahawa orang dalam berkenaan memiliki maklumat sensitif harga yang tidak tersedia secara umum dan bahawa dalam tempoh material berkenaan, beliau telah memperoleh atau melupuskan saham dalam syarikat yang menjadi subjek maklumat tersebut (lihat perenggan 65 & 69).

(6) (**oleh Vazeer Alam HMP, menyokong**) Seksyen 89E APS tidak mewujudkan kesalahan tanggungan keras. Sebaliknya, s 89E(1)(b) APS memerlukan bahawa seorang tertuduh atau defendan mengetahui atau sepatutnya secara munasabah mengetahui bahawa maklumat berkenaan tidak tersedia secara umum. Pengetahuan ini merupakan elemen mens rea bagi larangan dagangan orang dalam dan mahkamah hendaklah menentukannya secara objektif berdasarkan keterangan yang ada (lihat perenggan 78).

(7) (**oleh Vazeer Alam HMP, menyokong**) Dalam menentukan kesahan maklumat dalam pemilikan orang dalam sebagaimana ditakrifkan dalam s 89B APS, mahkamah tidak hanya terhad kepada fakta dan keadaan pada masa mana-mana pemerolehan atau dagangan sekuriti yang dipertikai, tetapi juga boleh mengambil kira fakta dan keadaan yang berlaku selepas pemerolehan atau dagangan tersebut (lihat perenggan 89).]

Cases referred to

Long bin Samat & Ors v PP [1974] 2 MLJ 152; [1974] CLJU 80; [1974] 1 LNS 80, FC (refd)

Commissioner of Income Tax, Ahmedabad v Gokuldas 1958 34 ITR 98, SC (refd)

Commissioner of Income Tax, West Bengal v Anwar Ali (1970) AIR 1782, SC (refd)

Engel and others v Netherlands (App Nos 5100/71, 5101/71, 5102/71) [1976] ECHR 5100/71 (refd)

Lew Chee Fai Kevin v Monetary Authority of Singapore [2012] 2 SLR 913, CA (not folld)

P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER 121, HL (refd)

PP v Ng Chee Keong & Anor [1999] 4 SLR 56; [1999] 2 SLR(R) 1176, HC (refd)

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)

R v Robert Bart Doff [2005] NSWCCA 119, SC (refd)

R v Peter Charles Pritchard Farris [2015] WASC 251, SC (refd)

R v Simon Gautier Hannes [2000] NSWCCA 503, SC (refd)

R v Rene Walter Rivkin [2004] NSWCCA 7, SC (refd)

Repco Holdings Bhd v PP [1997] 3 MLJ 681; [1997] 4 CLJ 740, HC (refd)

Securities Commission Malaysia v Toh Kai Fatt [2023] 10 MLJ 670, HC (folld)
Sharbern Holdings Inc v Vancouver Airport Centre Ltd [2011] SCJ No 23, SC (refd)
Soh Choo @ Soh Ai Choo & Anor v Unico-Desa Plantations Berhad & Ors [2011] MLJU 1592; [2011] 1 LNS 1101, HC (refd)
Suruhanjaya Sekuriti Malaysia v Chan Soon Huat [2018] 9 MLJ 782; [2017] CLJU 2175, HC (folld)
Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor [2019] MLJU 937; [2019] 1 LNS 1269, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 188, 188(1)(b)
Companies Act 1965 (repealed by Companies Act 2016) s 176
Criminal Procedure Code ss 3, 418A
Federal Constitution arts 4, 143(3), 145, 145(3), (3A)
Securities and Futures Act 2001 [SG] ss 200, 232
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) ss 89, 89B, 89E, 89E(1), (1)(a), (1)(b), (2), (2)(a), (4), 90, 90(1), (5), (6), (7), (8), (9), 90A, 90A(5), 100(1)(a), 126

Appeal from: *Sreesanthan a/l Eliathamby v Suruhanjaya Sekuriti Malaysia* [2024] 5 MLJ 209 (Court of Appeal, Putrajaya)

Gopal Sreenevasan (with Gurdial Singh Nijar, Lau Mark Chi-Ming, Abraham Au and Kristen Tan) (Sreenevasan Young) for the appellant.
SM Shanmugam (with Shoba Venu Gopal, Mageswary Karroppiah, Daniel Ariff Tung Adib Vincent Tung, Low Wen Zhen and Siew Hui Yi) (Shan Chambers) for the respondents.
Shamsul bin Bolhassan (with Liew Horng Bin) (Senior Federal Counsel, Attorney General's Chamber) amicus curie for the Attorney General's Chamber.

Hasnah Hashim CJ (Malaya):

INTRODUCTION

[1] This appeal concerns several issues of law in respect of a civil action under ss 89E and 90A of the Securities Industry Act 1983 ('the SIA') essentially for insider trading.

[2] The plaintiff/respondent, Securities Commission of Malaysia ('SC'), instituted proceedings against the defendant/appellant, Sreesanthan a/l Eliathamby ('Sreesanthan'), for insider trading involving the acquisition of 600,000 shares in Worldwide Holdings Bhd ('Worldwide'), a public listed company, from 7 June 2006 until 11 July 2006 pursuant to s 89E of the SIA and sought to make the defendant liable in a civil action for insider trading as

provided in s 90A of the SIA.

[3] The High Court allowed SC's claim against Sreesanthan and ordered as follows:

(a) a declaration that Sreesanthan had breached s 89E(2)(a) of the SIA;

(b) pursuant to s 90A(5) of the SIA, Sreesanthan pays to the SC the sum of RM1,989,402 being an amount equal to three times the amount of the difference between the price at which the shares in Worldwide were acquired by Sreesanthan and the price at which they would have been acquired at the time of the acquisition, if the information on the proposed privatisation of Worldwide had been generally available;

(c) an order that Sreesanthan be barred from being a director of any public listed company for a period of ten years pursuant to s 100(1)(a) of the SIA with effect from 19 November 2020;

(d) interest; and

(e) costs of RM100,000.

[4] The Court of Appeal unanimously dismissed the appeal and affirmed the decision of the High Court with costs of RM50,000.

LEAVE TO APPEAL

[5] The Federal Court granted leave to appeal on the following questions:

(1) leave question No 1:
In proving a breach of s 89E of the SIA whether:

(a) it is a matter of strict liability once possession of the information that is not generally available has been proven as stated in *Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor* [2019] MLJU 937; [2019] 1 LNS 1269; or

(b) if that is not the case, whether a breach of s 89E must be made out by:

(i) proof only of the knowledge of the defendant that the information in his possession was not generally available as held in the High Court in the instant case; or

(ii) proof that the defendant not only knew that the information was not generally available but in addition he intended to use the said information, having regard to *Public Prosecutor v Ng Chee Keong & Anor* [1999] 4 SLR 56; [1999] 2 SLR(R) 1176 and *Lew Chee Fai Kevin v Monetary Authority of*

Singapore [2012] 2 SLR 913 as well as *Soh Choo @ Soh Ai Choo & Anor v Unico-Desa Plantations Berhad & Ors* [2011] MLJU 1592; [2011] 1 LNS 1101.

(2) leave question No 2:
Whether in determining the materiality of the information in the possession of the insider (as defined s 89B of the SIA), a court:

(a) must only have regard to facts and circumstances at the time of the impugned acquisition; or

(b) may consider facts and circumstances occurring after the time of any impugned acquisition,

having regard to *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913.

(3) leave question No 3:
Does the power given solely to the Attorney General to institute 'any proceedings for an offence' under art 145(3) of the Federal Constitution extend to civil action brought under s 90A(5) of the SIA for the contravention of s 89E of the SIA, as is mandatory under s 126 of the SIA for a prosecution or a contravention of s 89E of the SIA;
(a) bearing in mind that:

(i) the underlying basis is the same;

(ii) the factual matrix is the same;

(iii) the consequences are serious for both-involving substantial penalties;

(iv) the stigma attached to a finding of liability is just as odious;

(v) the deterrent imperative is the same; and

(vi) the ethos is the furthering of the public interest.

(4) leave question No 4:
And having regard to the following decisions/authorities:

(a) *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681; [1997] 4 CLJ 740 which defined 'any proceedings' as all-embracing with no limit citing in support the decision of the House of Lords (UK) in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 at 136;

(b) the Indian authorities: where penalty regime enforceable via regulatory or civil enforcement, then construed as akin to criminal or quasi-criminal:

(i) *Commissioner of Income Tax, West Bengal v Anwar Ali* (1970) AIR 1782 (SC);

(ii) *Commissioner of Income Tax, Ahmedabad v Gokuldas* 1958 34 ITR.

(c) the EU Convention on Human Rights, article 6, which requires a fair process for both criminal and civil trials: *Engel and others v Netherlands (App Nos 5100/71, 5101/71, 5102/71)* [1976] ECHR 5100/71 A 22 (1976) based on a consideration of three factors, namely, how the transgression is classified, the nature of the offence, and the degree of severity of the punishment; and

(d) s 232 of the Singapore's Securities and Futures Act 2001.

(5) leave question No 5:
If the answer to question 3 is in the affirmative, then does this render unconstitutional any civil action instituted under s 90A(5) of the SIA without the consent of the Attorney General?

BACKGROUND FACTS

[6] Sreesanthan, a corporate lawyer, was at the material time a partner of the law firm of Messrs Kadir Andri & Partners and headed its corporate department.

[7] Worldwide was at the material time a public company listed on Bursa Malaysia. In March 2006, CIMB Investment Bank Bhd ('CIMB') came up with a plan for its major shareholder Perbadanan Kemajuan Negeri Selangor ('PKNS') to privatise Worldwide by way of a members' scheme of arrangement under the then s 176 of the Companies Act 1965 ('proposed privatisation').

[8] On 5 May 2006, representatives of CIMB met with Sreesanthan to obtain advice on legal aspects of the proposed privatisation. About a month later, on 7 June 2006, the representatives of CIMB met with the Selangor Menteri Besar, who was the Chairman of PKNS, to present their plan for the proposed privatisation.

[9] Around this time, between 6 June 2006 to 8 June 2006, several telephone conferences took place between the CIMB representatives and Sreesanthan. By June 2006, Messrs Kadir Andri & Partners was appointed as advisor for the proposed privatisation.

[10] It was the SC's case that during these interactions, Sreesanthan came into possession of information that PKNS was proposing to privatise its listed subsidiary, and that because Worldwide was the only listed subsidiary of PKNS, Sreesanthan had deduced the identity of Worldwide.

[11] Sreesanthan acquired 600,000 shares in Worldwide in June and July 2006. These shares were acquired in two tranches:

(a) 200,000 shares were acquired between 7 June 2006 and 13 June 2006, at the purchase price of between RM1.95 and RM1.96 per share; and

(b) 400,000 shares were acquired between 29 June 2006 and 11 July 2006 at the purchase price of between RM2.1242 and RM2.2415 per share.

[12] On 23 June 2006, Messrs Kadir Andri & Partners received instructions from CIMB to commence the preparation of the transaction documentation for the proposed privatisation and also to prepare the documentation required for the court application in respect of the scheme of arrangement.

[13] On 19 August 2006, *The Star* daily newspaper published an article that stated Worldwide was to be privatised by PKNS. This was the first time the information on the proposed privatisation became publicly available. A few days later, on 22 August 2006, the Worldwide share counter was suspended for trading as is the norm.

[14] A day later, on 23 August 2006, the board of directors of Worldwide announced that it had received a letter from PKNS, its major shareholder, stating its intention to privatise Worldwide by way of a scheme of arrangement ('announcement').

[15] Prior to the suspension of trading, the shares in Worldwide traded with a closing price of RM2.54 per share on 21 August 2006. The price at which PKNS offered to buy out the minority shareholders in the company was RM3.50, as disclosed in the announcement of 23 August 2006. When trading in the shares of Worldwide resumed on 25 August 2006, the opening price for the shares was RM3.22.

[16] On 14 September 2006 and 15 September 2006, Sreesanthan disposed all his 600,000 Worldwide shares and as a result made a profit.

[17] The SC commenced this civil action for insider trading against Sreesanthan on the basis of a contravention s 89E(2)(a) read together with s 90A of the SIA.

THE HIGH COURT

[18] On 4 November 2020 the High Court allowed the plaintiff's claim and made the following findings:

(a) Sreesanthan had in his possession information that PKNS proposed to privatise Worldwide;

(b) the information relating to the proposed privatisation that was in the possession of Sreesanthan was not generally available at the time he had acquired the 600,000 Worldwide shares;

(c) to establish mens rea for the purposes of the insider trading prohibition, it has to be proven that Sreesanthan knew or ought reasonably to know that the information in his possession was not generally available. No requirement arose for the SC to prove intention to use the inside information, as intent to use does not form part of any element of the insider trading prohibition. On the facts, it was sufficiently established that Sreesanthan knew or ought to reasonably know that the information in his possession was not generally available; and

(d) the information relating to the proposed privatisation by PKNS was material information within the meaning of s 89E(1)(a) of the SIA because:

(i) there was a sharp increase in the share price following the publication of information relating to the proposed privatisation in *The Star* article and the announcement on 23 August 2006;

(ii) the fact that PKNS was contemplating a privatisation of Worldwide was, without more, information that a reasonable person would expect to have a material effect on the price of Worldwide shares because it was reasonable to deduce that the offer price would be at a premium to the prevailing market price. It was not necessary for the plaintiff to prove that the defendant knew, at the time he traded in the Worldwide shares, how the privatisation was to be affected, or what the offer price for the shares was to be; and

(iii) the trial judge preferred the testimony that the plaintiff's expert gave at trial over the evidence of the defendant's expert, particularly on the issue of materiality of the information; and

(iv) the present proceedings did not amount to 'proceedings for an offence' within the meaning of art 145(3) of the Federal Constitution ('the FC'), and thus they need not have been commenced by the Attorney General. As a corollary, s 90 of the SIA is not inconsistent with art 145(3) of the FC and therefore does not contravene art 4 of the FC.

PROCEEDINGS AT THE COURT OF APPEAL

[19] Dissatisfied, the defendant appealed against the High Court's decision. On 5 September 2022, the Court of Appeal unanimously dismissed the appeal with costs of RM50,000 to be paid to the plaintiff.

[20] There were four main issues canvassed before the Court of Appeal, which are:

(a) that the consent of the Attorney General is necessary for the civil suit, and absent that, the whole proceedings is unconstitutional, null and void;

(b) that the plaintiff had not proved that the information with respect to PKNS privatising its listed subsidiary Worldwide was information not generally available when it had become market news;

(c) that the plaintiff had not proved that such information, which included the price at which the shares would be offered if generally available, would be price-sensitive information as regards the price of shares in Worldwide; and

(d) that the plaintiff had not proved that the defendant had put the impugned information to 'improper use', a necessary ingredient of the offence, by the purchase of the impugned shares as the defendant had purchased the impugned shares in Worldwide based on a CIMB research report given to him by his stockbroker where it was obvious that Worldwide would be declaring a dividend soon and that the company's shares were undervalued.

[21] In brief, the Court of Appeal made the following findings:

(a) the information on the privatisation of Worldwide by PKNS, ie the inside information, was known to the defendant from his direct involvement in the corporate exercise;

(b) the defendant knew as a matter of fact that this inside information was not generally available as it was information disclosed on a strictly confidential basis;

(c) the High Court had not erred or failed to appreciate the evidence before it in concluding that the not generally available information was such that a reasonable person would expect it to have a material effect on the price or the value of securities of Worldwide;

(d) the High Court was right in carefully considering every relevant piece of evidence to finally conclude on the balance of probabilities that the defendant was in possession of the not generally available price-sensitive inside information and that he purchased the impugned shares before the

information of the privatisation of Worldwide by PKNS was made public either via *The Star* business news report or the formal announcement. And that, as such, the contravention of s 89E(2) of the SIA had been proved for the purpose of a civil action in disgorgement of the gain under s 90(1) of the SIA, and for the remedies under s 90A(5) of the SIA.

(e) the civil action commenced by the plaintiff was perfectly in order and not null and void. There was nothing unconstitutional about the civil action, and remedies sought, nor is it a case of lack of jurisdiction that would justify a striking out of the civil claim; and

(f) the reliefs granted by the High Court were reasonable having regard to all relevant circumstances in the commission of a breach of s 89E(2)(a) of the SIA.

THIS APPEAL

[22] The plaintiff's pleaded case is that the defendant was engaged as solicitor by CIMB to advise on a corporate exercise and that in the course of that engagement the defendant had on 5 May 2006 possessed inside information relating to the proposed privatisation of Worldwide which was to be undertaken by way of a member's scheme of arrangement under s 176 of the Companies Act 1965 (then in force, now repealed and replaced). The plaintiff alleged that equipped with knowledge of the proposed privatisation, the defendant purchased the 600,000 Worldwide shares and subsequently profited from their sale because the corporate exercise resulted in a higher price of Worldwide shares.

[23] Hence, the plaintiff contended that the defendant had contravened the statutory prohibition in s 89E(2)(a) of the SIA and instituted this civil action in disgorgement of the gain under s 90(1) of the SIA and prayed for the remedies provided under s 90A(5) of the SIA. The defendant's defence to the claim was that he was a long-term investor in the stock market and that he was approached by his stock broker well before CIMB had approached him with an analyst report promoting Worldwide as a stock to invest in. Based on this, the defendant had instructed his broker to purchase shares in Worldwide. The defendant claimed that the identity of Worldwide as the company for the proposed corporate exercise was not made known to him until after he had given instructions for the purchase of Worldwide shares. The defence also is that the plaintiff cannot prove that the defendant possessed the inside information as pleaded before he acquired the Worldwide shares.

THE ISSUES IN THIS APPEAL

[24] The defendant raised three main issues in this appeal, for which leave was granted on 25 April 2024, and they are well set out in the defendant's counsel's written submissions. They are:

(a) first issue:
Whether intent to use the alleged inside information which forms the mens rea or mental element is required to ground liability pursuant to s 89E of the SIA, or whether it is a matter of strict liability that requires proof of mere possession of inside information, or whether proof only that the defendant knew that the information was not generally available information, suffices (breach issue). The determination of this first issue would answer leave question No 1;

(b) second issue:
Whether the relevant time to assess the materiality of the alleged inside information is at the time the impugned acquisition occurs, or whether a court may consider the facts and circumstances occurring after the time of the impugned acquisition (materiality issue). The determination of this second issue would answer leave question No 2; and

(c) third issue:
Whether the power given solely to the Attorney General ('AG') to institute 'any proceedings for an offence' under art 145(3) of the Federal Constitution extends to a civil action brought under ss 90 and 90A(5) of the SIA (constitutional issue). The determination of this third issue would answer leave question No 3, 4 and 5.

[25] My learned brother, Justice Vazeer Alam Mydin Meera FCJ will address the mens rea or mental element as well as the materiality issue in the judgment that follows.

[26] The crucial question as regards to the third issue is, if a civil regime is introduced to allow a body or institution other than the AG as the public prosecutor to commence proceedings to enforce the same offence in a civil court, do such proceedings fall within the meaning of 'any proceedings for an offence' and ipso facto also subject to art 145(3) of the FC.

[27] The learned High Court judge was of the view that the word 'offence' must mean a crime or breach of law giving rise only to criminal penalties. For that reason, His Lordship held that proceedings commenced pursuant to s 90 of the SIA are not 'criminal in nature' and hence altogether not 'proceedings for an offence'. The Court of Appeal's reasoning in this respect differs slightly from that of the High Court. The Court of Appeal whilst recognising that civil action instituted under s 90A(5) of the SIA is predicated on the same offence of

insider trading in violation of the same SIA, and further noting that both are initiated in the public interest, drew an important distinction that the successful conclusion of the criminal proceedings would result in a record of conviction with an imposition of a penal sentence whilst a successful civil action would not result in a record of conviction but merely a monetary judgment without any penal sanction.

THE CONSTITUTIONAL ISSUE

[28] This judgment addresses the constitutional issue, that is, whether the powers given to the AG under art 143(3) of the FC extends to a civil action brought under ss 90 and 90A(5) of the SIA.

LEGISLATIVE FRAMEWORK

[29] The prohibition against insider trading is found in s 89E of the SIA (now s 188 of the Capital Markets and Services Act 2007 ('the CMSA')), and that reads:

89E Prohibited conduct of person in possession of inside information

(1) A person is an 'insider' if that person —

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

(b) knows or ought reasonably to know that the information is not generally available.

(2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —

(a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to —

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement

with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

(4) A person who contravenes or fails to comply with subsection (2) or (3) commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.

(5) ...

[30] Whilst insider trading is a criminal offence under s 89E(4), a transgression of s 89E(2) can also give rise to civil liability under s 90(1) of the SIA that provides:

90 Civil remedies

(1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, the Commission may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.

(2) A proceeding under subsection (1) or under section 88A or 90A may be begun at any time within twelve years from —

(a) the date on which the cause of action accrued; or

(b) the date on which the Commission or the plaintiff, as the case may be, discovered the contravention,

whichever is the later.

[31] If the plaintiff is successful in the civil proceedings instituted against the defendant under s 90(1), the plaintiff can recover from the defendant, pursuant to s 90A of the SIA:

(a) an amount equal to three times the amount of gain; and

(b) claim civil penalty in such amount as the court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit.

[32] The defendant contends that the consent of the Attorney General is necessary for the civil suit, and absent that, the whole proceedings is unconstitutional, null and void. The High Court and Court of Appeal considered this argument in some detail, as can be seen in paras 188 to 199 of the High Court's grounds of judgment and paras 15 to 42 of the Court of Appeal's grounds of judgment. Both concluded that the Attorney General's prosecutorial powers under art 145(3) of the FC does not extend to civil proceedings under ss 90 and 90(5) of SIA. We agree with both their decision as they are well-supported by principle and authority as explained by the High Court and Court of Appeal in their reported judgments.

[33] Article 145 of the FC provides for the appointment, duties and powers of the Attorney General. It reads as follows:

> (1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a person who is qualified to be a judge of the Federal Court to be the Attorney General for the Federation.
>
> (2) It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.
>
> (3A) Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.
>
> (4) In the performance of his duties the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation.
>
> (5) Subject to Clause (6), the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong and may at any time resign his office and, unless he is a member of the Cabinet, shall receive such remuneration as the Yang di-Pertuan Agong may determine.
>
> (6) The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.

[34] Article 145(3) of the FC expressly states the powers of the Attorney General in relation to prosecutions and proceedings for criminal offences. Under art 145(3) a Federal law may confer on the AG the power to transfer '... any proceedings which has power under Clause (3) to institute'. It is the appellant's argument that art 145(3) of the FC includes civil actions brought by the SC under s 90A of the SIA. That is, any civil actions initiated by the SC under the SIA requires the AG's consent.

[35] The Prime Minister explained at the second reading of the Constitution (Amendment) Bill 1988 as reported in the Hansard, that the purpose of inserting art 145(3A) of the FC is to enshrine the power to transfer criminal cases in s 418A of the Criminal Procedure Code ('the CPC') in the FC, and remove any uncertainty on the constitutionality of s 418A CPC:

Memandangkan keperluan tersebut, Parlimen telah mengkanunkan Akta Kanun Prosedur Jenayah (Pindaan dan Perluasan) 1976 yang menambahkan kepada Kanun Prosedur Jenayah satu seksyen baru, iaitu seksyen 418A. Seksyen itu memberi kuasa kepada Pendakwa Raya untuk meminta mahkamah rendah memindahkan kes yang menunggu penyelesaian dihadapannya ke Mahkamah Tinggi di tempat yang ditetapkan oleh Pendakwa Raya, dan Mahkamah Rendah berkewajipan menghantar kes itu ke Mahkamah Tinggi yang ditetapkan itu tanpa mengadakan apa-apa penyiasatan awal. Beberapa kes telah dipindahkan ke Mahkamah Tinggi di bawah seksyen itu. Dalam tahun 1976 seksyen itu telah dicabar dan Mahkamah Tinggi memutuskan seksyen itu tidak sah kerana bercanggah dengan Perlembagaan, tetapi Mahkamah Persekutuan, setelah mendengar rayuan terhadap keputusan itu, telah memutuskan seksyen itu adalah sah. Dalam tahun 1987 seksyen itu dicabar lagi atas alasan-alasan lain pula, dan kali ini Mahkamah Agung memutuskan bahawa seksyen itu tidak sah. Semua ini jelas menunjukkan terdapatnya ketidakpastian tentang sahnya seksyen itu. Oleh itu, demi untuk membolehkan Peguam Negara menjalankan tugas-tugasnya sebagai Pendakwa Raya dengan tegas, adalah difikirkan perlu mengadakan peruntukan khusus dalam perlembagaan yang akan membolehkan peruntukan seperti seksyen 418A itu dibuat dalam undang-undang.

Untuk maksud itu, Fasal 10 Rang Undang-undang ini mencadangkan supaya dimasukkan ke dalam Perkara 145 Fasal baru (3A) yang membolehkan undang-undang Persekutuan memberi kuasa kepada Peguam Negara menentukan mahkamah-mahkamah di mana prosiding-prosiding yang Peguam Negara berkuasa memulakan akan diadakan atau kepada mana prosiding itu akan dipindahkan.

[36] In *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152; [1974] CLJU 80; [1974] 1 LNS 80, the Federal Court through the judgment of Suffian LP explained:

In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings which he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhornes speech at pp 32–33 in *Smedleys Ltd v Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

[37] The powers of the AG were again raised and argued in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681. Gopal Sri Ram J sitting as a High

Court judge (as he then was) held:

> [1] Reading the plain language of art 145(3) of the Federal Constitution, it is clear that the supreme law has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings. Sections 376 and 380 of the Criminal Procedure Code, likewise, make it clear that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney General as public prosecutor.
>
> [1a] The expression 'conduct' in art 145(3) of the Federal Constitution cannot but refer to the conduct of prosecutions in court. So also, the expression 'control and direction' in s 376(i) of the Criminal Procedure Code which must refer to all criminal prosecutions and proceedings. The word 'conduct' appearing in art 145(3) and in sub-ss 39(2) of the SCA and 126(2) of the SIA, however, carries the same meaning.
>
> [2] Since the Federal Constitution exclusively authorises the Attorney General to conduct prosecutions, it must follow that no other authority may be lawfully empowered to exercise that function.

[38] As articulately explained by Gopal Sri Ram, J in *Repco* that the supreme law, namely the FC, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

[39] Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 further articulated that the word 'conduct' in art 145(3) refers:

> ... to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s 377 of the Code. And 'control and direction' in s 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.

[40] Therefore, the provisions of the CPC should be read and referred to within its proper context. The definition of 'offence' in the CPC does not have the effect of expanding 'proceedings for an offence' in art 145(3) to include non-criminal matters. Neither does s 3 of the CPC intend the creation of the novel concept of 'civil offences' or 'civil prosecutions'. Thus, the definition of 'offence' as provided under the CPC relates only to criminal offences. The word offence does not extend to include civil actions. The powers of the AG under art 145(3) of the FC are crystal clear and apply only to prosecutions and proceedings for criminal offences.

[41] Undeniably, as the guardian of public interest, the AG can apply to intervene in civil actions where public interest is concerned, however, this does

not mandate that the AG's consent is necessary in order to initiate such civil actions. The existence of the element of public interest does not mean a civil action falls within the definition of 'proceedings for an offence' under art 145(3) of the FC.

[42] We therefore agree with the plaintiff's contention that the defendant's expansive reading of the term 'proceedings for an offence' in art 145 to include civil proceedings under s 90A(5) is untenable for the following reasons:

(a) 'offence' in the FC consistently refers to criminal offences for which a person is charged, convicted or acquitted, and sentenced;

(b) 'Any proceedings for an offence' in the specific context of art 145(3) of the FC has been consistently interpreted by the courts to refer to criminal prosecution and proceedings for criminal offences;

(c) the defendant's interpretation of 'proceedings for an offence', if accepted, would be far-reaching effect on civil actions and other statutory regimes of similar nature;

(d) unlike a criminal offence for which there is no time bar, the civil claim under s 90 of the SIA has a statutory time bar of 12 years from the date on which the cause of action accrued as stated in s 90(5);

(e) the non-payment of any judgment sums ordered to be recovered or penalty imposed by the court for a claim under s 90A(5) would be a civil debt, which needs to be enforced in the usual ways a judgment for monies owing is enforced;

(f) unlike a fine or penalty imposed in a criminal proceeding, the manner in which the amount recovered by the Securities Commission in an action pursuant to ss 90(5) or (6) is dealt with in a uniquely different manner as stipulated in ss 90(7), 90(8) and 90(9) of the SIA, which reads:

> (7) An amount recovered or obtained by the Commission in an action pursuant to subsection (5) or (6), respectively, shall be applied —
>
> (a) firstly, to reimburse the Commission for all costs of the investigation and proceedings in respect of the contravention or suspected contravention; and
>
> (b) secondly —
>
> (i) where it relates to subsection (5), to compensate the sellers who disposed of securities of the same class on the stock market of the stock exchange when information was not generally available between the time when the first contravention of subsection 89E (2) occurred and the time when information became generally available; and
>
> (ii) where it relates to subsection (6), to compensate the buyers who acquired securities of the same class on the stock market of the stock exchange when information was not generally available between the

time when the first contravention of subsection 89E (2) occurred and the time when information became generally available.

(8) If the Commission considers that it is not practicable to compensate the persons referred to in paragraph (7)(b), in view of the likely administration costs, the amount of any potential distribution to each person and the difficulty of ascertaining or notifying the persons whom it is appropriate to compensate, as the case may be, the Commission may decide not to distribute to the persons referred to in paragraph (7)(b).

(9) To the extent that any of the amount recovered or obtained in a civil action under subsection (5) or (6) has not been distributed pursuant to subsection (7), it shall be paid to the compensation fund maintained under Part VIII or retained by the Commission to defray the costs of regulating market trading, as the Commission, with the approval of the Minister, may determine.

[43] Hence, we concur with the Court of Appeal that the definition of 'offence' in the CPC does not have the effect of expanding the term 'proceedings for an offence' in art 145(3) to include non-criminal matters as contended by counsel for the plaintiff. Neither does s 3 of the CPC intend the creation of the novel concept of 'civil offences' or 'civil prosecutions'. The definition of 'offence' as provided under the CPC relates only to criminal offence. The word 'offence' does not extend to include civil actions. The powers of Attorney General under art 145(3) of the FC are crystal clear and applies only to prosecutions and proceedings for criminal offences and does not extend to civil actions brought under s 90A(5) of the SIA.

[44] We therefore answer the questions in the negative in that the power given solely to the AG to institute 'any proceedings for an offence' under art 145(3) of the FC does not extend to civil action brought under s 90A(5) of the SIA for the contravention of s 89E of the SIA. Therefore, any civil action instituted under s 90A(5) of the SIA does not require the consent of the AG and does not render the civil action under the SIA and the imposition of sentence unconstitutional.

CONCLUSION

[45] For the reasons we have stated above, the appeal is dismissed with costs of RM100,000 subject to allocator. The judgments of the Court of Appeal and the High Court are affirmed.

[46] My learned brother judges, Justice Abdul Karim Abdul Jalil FCJ and Justice Vazeer Alam FCJ have had sight of the judgment in draft and concur with the reasons given and the conclusions reached.

Vazeer Alam FCJ (delivering supporting judgment of the court):

INTRODUCTION

[47] This appeal concerns several issues of law in respect of a civil action under ss 89E and 90A of the Securities Industry Act 1983 ('the SIA') essentially for insider trading.

[48] The plaintiff/respondent, Securities Commission of Malaysia, instituted proceedings against the defendant/appellant, Sreesanthan a/l Eliathamby, for insider trading involving the acquisition of 600,000 shares in Worldwide Holdings Bhd ('Worldwide'), a public listed company, from 7 June 2006 until 11 July 2006 pursuant to s 89E of the SIA and sought to make the defendant liable in a civil action for insider trading as provided in s 90A of SIA.

[49] The High Court allowed the plaintiff's claim and the Court of Appeal unanimously affirmed that decision and dismissed the appeal.

LEAVE TO APPEAL

[50] The Federal Court granted leave to appeal on the following questions:

(1) leave question No 1:
In proving a breach of s 89E of the (SIA) whether:

(a) it is a matter of strict liability once possession of the information that is not generally available has been proven as stated in *Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor* [2019] MLJU 937; [2019] 1 LNS 1269; or

(b) if that is not the case, whether a breach of s 89E must be made out by:

(i) proof only of the knowledge of the defendant that the information in his possession was not generally available as held in the High Court in the instant case; or

(ii) proof that the defendant not only knew that the information was not generally available but in addition he intended to use the said information, having regard to *Public Prosecutor v Ng Chee Keong & Anor* [1999] 4 SLR 56; [1999] 2 SLR(R) 1176 and *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 as well as *Soh Choo @ Soh Ai Choo & Anor v Unico-Desa Plantations Berhad & Ors* [2011] MLJU 1592; [2011] 1 LNS 1101.

(2) leave question No 2:

Whether in determining the materiality of the information in the possession of the insider (as defined s 89B of the SIA), a court:

(a) must only have regard to facts and circumstances at the time of the impugned acquisition; or

(b) may consider facts and circumstances occurring after the time of any impugned acquisition,

having regard to *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913.

(3) leave question No 3:
Does the power given solely to the Attorney General to institute 'any proceedings for an offence' under art 145(3) of the Federal Constitution extend to civil action brought under s 90A(5) of the SIA for the contravention of s 89E of the SIA, as is mandatory under s 126 of the SIA for a prosecution or a contravention of s 89E of the SIA;
(a) bearing in mind that:

(i) the underlying basis is the same;

(ii) the factual matrix is the same;

(iii) the consequences are serious for both-involving substantial penalties;

(iv) the stigma attached to a finding of liability is just as odious;

(v) the deterrent imperative is the same;

(vi) the ethos is the furthering of the public interest.

(4) leave question No 4:
And having regard to the following decisions/authorities:

(a) *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681; [1997] 4 CLJ 740 which defined 'any proceedings' as all-embracing with no limit citing in support the decision of the House of Lords (UK) in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 at 136;

(b) the Indian authorities: where penalty regime enforceable via regulatory or civil enforcement, then construed as akin to criminal or quasi-criminal:

(i) *Commissioner of Income Tax, West Bengal v Anwar Ali* [1970] AIR 1782 (SC);

(ii) *Commissioner of Income Tax, Ahmedabad v Gokuldas* 1958 34 ITR.

(c) the EU Convention on Human Rights, article 6, which requires a

fair process for both criminal and civil trials: *Engel and others v Netherlands (App Nos 5100/71, 5101/71, 5102/71)* [1976] ECHR 5100/71 A 22 (1976) based on a consideration of three factors, namely, how the transgression is classified, the nature of the offence, and the degree of severity of the punishment; and

(d) s 232 of the Singapore's Securities and Futures Act 2001.

(5) leave question No 5:
If the answer to question 3 is in the affirmative, then does this render unconstitutional any civil action instituted under s 90A(5) of the SIA without the consent of the Attorney General?

BACKGROUND FACTS

[51] The background facts are well set out in the judgment of my learned sister Hasnah bt Dato' Mohammed Hashim CJM, and I do not wish to repeat the same.

THE HIGH COURT PROCEEDINGS

[52] The High Court allowed the plaintiff's claim and made the following key findings:

(a) the defendant was in possession of information that PKNS intended to privatise Worldwide;

(b) at the time the defendant acquired 600,000 shares in Worldwide, the information regarding the proposed privatisation was not publicly available;

(c) to establish mens rea under the insider trading prohibition, it was sufficient to prove that the defendant knew or ought reasonably to have known that the information was not generally available. There was no requirement to prove that the defendant intended to use the inside information. On the facts, the court found that this knowledge requirement was met;

(d) the information concerning the proposed privatisation by PKNS constituted 'material information' within the meaning of s 89E(1)(a) of the Securities Industry Act ('the SIA') because:

(i) there was a significant increase in Worldwide's share price following the publication of the Star article and the official announcement on 23 August 2006;

(ii) the mere fact that PKNS was considering a privatisation was sufficient for a reasonable person to expect that it would materially affect the share price, as a privatisation offer would likely be made

at a premium. It was not necessary for the plaintiff to prove that the defendant knew the details of the privatisation or the proposed offer price at the time of the trade;

(iii) the trial judge preferred the evidence of the plaintiff's expert, especially on the issue of materiality; and

(iv) the proceedings were not 'proceedings for an offence' under art 145(3) of the Federal Constitution and therefore did not require the Attorney General's consent. Consequently, s 90 of the SIA did not contravene art 145(3) or art 4 of the Constitution.

THE COURT OF APPEAL PROCEEDINGS

[53] Dissatisfied with the High Court's decision, the defendant appealed. The Court of Appeal unanimously dismissed the appeal.

[54] Four main issues were raised at the Court of Appeal, and they are:

(a) whether the Attorney General's consent was required for the civil action, and if not obtained, whether the proceedings were unconstitutional and void;

(b) whether the plaintiff had failed to prove that the information about PKNS's proposed privatisation of Worldwide was not generally available, given it had become market speculation;

(c) whether the plaintiff had failed to prove that such information, including the potential offer price, was price-sensitive; and

(d) whether the plaintiff had failed to prove that the defendant made 'improper use' of the information, as the defendant claimed his share purchase was based on a CIMB research report and his broker's advice, not insider knowledge.

[55] The Court of Appeal held as follows:

(a) the defendant had direct involvement in the corporate exercise and was aware of the proposed privatisation;

(b) he knew the information was confidential and not publicly available;

(c) the High Court correctly concluded that the information was of a kind that a reasonable person would expect to materially affect the price or value of Worldwide shares;

(d) the High Court properly evaluated all evidence and rightly concluded on a balance of probabilities that the defendant possessed non-public, price-sensitive information when he purchased the shares, before the

information was made public through media or announcement. Accordingly, the breach of s 89E(2) of the SIA was proven for the purposes of civil recovery under s 90(1) and remedies under s 90A(5) of the SIA;

(e) the civil action was valid, constitutional, and within the jurisdiction of the court. There were no grounds to strike it out; and

(f) the remedies granted by the High Court were appropriate given the nature and circumstances of the breach of s 89E(2)(a) and the statutory remedies provided in s 90A(5).

THE FEDERAL COURT APPEAL

[56] The plaintiff's pleaded case is that the defendant was engaged as solicitor by CIMB to advise on a corporate exercise and that in the course of that engagement the defendant had on 5 May 2006 possessed inside information relating to the proposed privatisation of Worldwide which was to be undertaken by way of a member's scheme of arrangement under s 176 of the Companies Act 1965 (then in force, now repealed and replaced by the 2016 Act). The plaintiff alleged that equipped with knowledge of the proposed privatisation, the defendant purchased the 600,000 Worldwide shares and subsequently profited from their sale because the corporate exercise resulted in a higher price of Worldwide shares.

[57] Hence, the plaintiff contended that the defendant had contravened the statutory prohibition in s 89E(2)(a) of the SIA and instituted this civil action in disgorgement of the gain under s 90(1) of the SIA and prayed for the remedies provided under s 90A(5) of the SIA. The defendant's defence to the claim was that he was a long-term investor in the stock market and that he was approached by his stock broker well before CIMB had approached him with an analyst report promoting Worldwide as a stock to invest in. Based on this, the defendant had instructed his broker to purchase shares in Worldwide. The defendant claimed that the identity of Worldwide as the company for the proposed corporate exercise was not made known to him until after he had given instructions for the purchase of Worldwide shares. The defence also is that the plaintiff cannot prove that the defendant possessed the inside information as pleaded before he acquired the Worldwide shares.

THE ISSUES IN THIS APPEAL

[58] The defendant raised three main issues in this appeal, for which leave was granted on 25 April 2024, and they are well set out in the defendant's counsel's written submissions. They are:

(a) first issue:

Whether intent to use the alleged inside information which forms the mens rea or mental element is required to ground liability pursuant to s 89E of the SIA, or whether it is a matter of strict liability that requires proof of mere possession of inside information, or whether proof only that the defendant knew that the information was not generally available information, suffices (breach issue). The determination of this first issue would answer leave question No 1;

(b) second issue:
Whether the relevant time to assess the materiality of the alleged inside information is at the time the impugned acquisition occurs, or whether a court may consider the facts and circumstances occurring after the time of the impugned acquisition (materiality issue). The determination of this second issue would answer leave question No 2; and

(c) third issue:
Whether the power given solely to the Attorney General ('AG') to institute 'any proceedings for an offence' under art 145(3) of the Federal Constitution extends to a civil action brought under ss 90 and 90A(5) of the SIA (constitutional issue). The determination of this third issue would answer leave question No 3, 4 and 5.

[59] My learned sister Hasnah Mohammed Hashim CJM, has dealt with the third issue in a separate judgment, which I have had sight. I concur with the reasons given therein and the conclusion reached. I shall therefore deal with the remaining two issues, namely the first and second issues.

FIRST ISSUE — BREACH

[60] The prohibition against insider trading is found in s 89E of the SIA (now s 188 of the Capital Markets and Services Act 2007 ('the CMSA')), and that reads:

89E Prohibited conduct of person in possession of inside information

(1) A person is an 'insider' if that person —

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

(b) knows or ought reasonably to know that the information is not generally available.

(2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —

(a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to —

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

(4) A person who contravenes or fails to comply with subsection (2) or (3) commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.

(5) ...

[61] Whilst insider trading is a criminal offence under s 89E(4), a transgression of s 89E(2) can also give rise to civil liability under s 90(1) of the SIA that provides:

90 Civil remedies

(1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, the Commission may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.

(2) A proceeding under subsection (1) or under section 88A or 90A may be begun at any time within twelve years from —

(a) the date on which the cause of action accrued; or

(b) the date on which the Commission or the plaintiff, as the case may be, discovered the contravention,

whichever is the later.

[62] And in the event the plaintiff is successful in the civil proceedings instituted against the defendant under s 90(1), the plaintiff can recover from the defendant, pursuant to s 90A of the SIA:

(a) an amount equal to three times the amount of gain; and

(b) claim civil penalty in such amount as the court considers appropriate

having regard to the seriousness of the contravention, being an amount not more than one million ringgit.

[63] The issue now is whether s 89E of the SIA (now s 188 of the CMSA):

(a) imposes strict liability; or

(b) requires a mental element (mens rea) in that the insider 'knows or ought reasonably to know' (as in s 89E(1)(b)) that the information is not generally available; or

(c) in addition to 'knows or ought reasonably to know', does the mental element (mens rea) in s 89E(1)(b)) also require 'intention to use' the inside information that is not generally available.

[64] Both the High Court and Court of Appeal considered this issue in some depth and held:

(a) s 89E does not impose strict liability;

(b) s 89E(1) requires mental element (mens rea) in that the insider 'knows or ought reasonably to know' that the information is not generally available as stated in s 89E(1)(b); and

(c) s 89E(1) of the SIA does not require proof of 'intention to use' or 'improper use' of the information.

[65] Learned counsel for the defendant submits that s 89E(1) requires proof of intention to use, and to that extent contends that both the High Court and Court of Appeal had erred. I do not find merit in this argument. Prior to 1998, ie before the amendment to SIA, the prohibition against insider trading was based on the fiduciary theory of insider trading, where the insider trading prohibition operated against a person who owed a duty of loyalty to a company and in circumstances where his exploitation of material non-public information for his personal gain constituted a breach of that duty.

[66] Therefore, pre-1998, it must be proven that the offender was:

(a) an officer, agent or employee of the company or of a stock exchange; and

(b) that he made improper use of specific confidential information acquired by virtue of his position to gain an advantage for himself.

[67] The pre-amendment ss 89 and 90 bear little resemblance to the amended s 89E of the SIA. The learned High Court judge had discussed this historical genesis and transformation in his grounds of judgment:

> [28] The insider trading prohibitions, in their current form, were introduced in 1998 (the provisions were introduced by the Securities Industry (Amendment) Act

1998, which however came into force only in 2000), by way of amendment to the Securities Industry Act 1983. These provisions traced their genesis to the Australian Corporations Law 1990 (by way of amendments introduced in the Corporations Legislation Amendment Act 1991), and marked an important change in the way in which insider trading was regulated. Due to the similarity of our provisions to those contained in the equivalent Australian provisions, cases decided in Australia under the insider trading laws after 1991 would be persuasive in Malaysian courts.

[29] Previously, the prohibition against insider trading was based on the fiduciary theory of insider trading: the prohibition operated against a person who owed a duty of loyalty to a company and in circumstances where his exploitation of material nonpublic information for his personal gain constituted a breach of this duty. Thus, under the previous s 89 of the Securities Industries Act 1993, it must be shown that the offender was an officer, agent or employee of the company or of a stock exchange and that he had made improper use of specific confidential information acquired by virtue of his position to gain an advantage for himself. Similarly, the old s 90 required proof of improper use of material non-public information acquired in an official capacity. It is for this reason that the offender is referred to as an 'insider', because of the role he plays in the company to which the 'inside' information relates. Because the original insider trading offences contained in ss 89 and 90 of the Securities Industry Act 1983 bear little similarity to the current provisions, care must be taken when referring to cases decided under the old law.

[30] By contrast, the new provisions contained a number of innovations. First, the provisions were no longer based on the principle that the wrongdoer must be somehow related to or a fiduciary of the company in question. An 'insider' need not be an insider at all: he may well be a stranger to the company. For example, in *R v Alan Bartle Evans*; *R v Gregory James Doyle* [1999] VSC 488), the accused Evans was the financial director of MPI Pty Ltd. MPI Pty Ltd discovered nickel sulphide deposits on its mining lease located near Kalgoorlie. Evans proceeded to acquire shares in a publicly listed company, Mt Kersey Mining NL, which owned mining leases in the adjoining tenements. He did so allegedly on the basis that mineral deposits could reasonably be expected to also be contained in the mining leases owned by Mt Kersey and therefore its share price could reasonably be expected to rise once the investing public received and assimilated news of MPI Pty Ltd's discovery. Evans was an 'insider' even though he was not an officer of the company in whose shares he traded. For as long as he was in possession of price-sensitive information that was not generally available to investors and he knew that to be the case, he would be subject to the trading and tipping prohibitions (in this case, the charges were dismissed because leave to amend the charges was refused). The underlying principle was that insider trading undermines the belief in the fairness of, and the confidence in, the securities market. The long term viability of a securities market is thought to depend on the confidence that participants have in its integrity and their ability to participate in it on level terms. This principle underlying the new legislative philosophy is termed the market integrity or market access theory.

[31] The second significant change was that the causal nexus between the inside information and the prohibited conduct was severed: it no longer became necessary for the prosecution or plaintiff to establish that the accused person or defendant had used the inside information for the purposes of trading. There was now a blanket

trading prohibition: once a person is in possession of material non-public information and he knows this to be the case, he simply cannot trade on the securities to which the information relates. It does not matter that he had not used the information for the purposes of his trading. As will be seen later, this is a point that is pertinent in the context of the present case.

[32] The third significant and related point was that it was no longer necessary to establish the mental element that was previously required under the previous provisions: that the insider had intended to make improper use of insider information for the purposes of attaining a gain or to avoid a loss. Both ss 89 and 90 of the Securities Industry Act 1993 required proof of the subjective intent of the offender. By contrast, under the present provisions, once it is shown that the accused or the defendant was in possession of material non-public information, that he knew or ought reasonably to know that the information was not generally available, and that he had traded in the shares to which that information relates, he would have contravened the trading prohibition and an offence would be established.

[33] That this is the case is clear from the plain words of s 89E of the Securities Industry Act 1983. All that is necessary in order to establish mens rea for the purposes of the trading prohibition is to prove that the accused or defendant knew or ought reasonably to know that the information in his possession was not generally available (s 89E(1)(b)).

[68] Similarly, the Court of Appeal made the following findings as regards the mental element required to be proved for any transgression of s 89E:

[112] It was vigorously argued that the offence of 'insider trading' is not proved if it is not shown how the alleged offender has made 'improper use of such unpublished price-sensitive insider information' without which there is no mens rea for the offence. With respect mens rea for an offence is not to be conflated with the rationale for the offence. An offence is constituted if the elements of the offence as defined have been proved.

[113] Perhaps learned counsel for the appellant was influenced by the original definition of the offence of 'insider trading' where under the SIA that came into force on 7 July 1983, s 90 thereof which provided for the offence had stated the prohibition against the insider to be that he 'shall not make improper use of such information to gain, directly or indirectly, an advantage for himself or for any other person and any person who contravenes or fails to comply with the provisions of this section commits an offence'.

[114] *A seismic change had taken place where the offence of 'insider trading' had been redefined to now consist of two main ingredients ie an insider being in possession of not generally available price-sensitive information and during that material period had made a acquisition or disposal of shares in the company, the subject of the information. Very significantly the element of having to prove 'improper use of such information' had been deleted. In other words, if one is present (being possessed of the information) and the other is done (acquire or purchase securities), then an offence of insider trading would have been committed.*

[115] The amendment was introduced by Securities Industry (Amendment) Act 1998 (Act A1017) wherein new provisions in ss 89A, 89B, 89C, 89D, 89E, 89F,

89G, 89H, 89I, 89J, 89K, 89L, 89M, 89N and 89O were introduced which came into force on 1 April 1998. The old s 90 of the SIA was repealed and in its place was substituted the above provisions. Section 90 was then redrafted to provide for 'Civil Remedies'.

...

[119] By no means does that redefinition convert the offence into a strict liability offence. Mens rea is still the required ingredients in the element of 'being in possession of not generally available price-sensitive information' and that of 'acquire or dispose of securities'. Thus, with respect to 'possession of information that is not generally available' the SC still has to prove that the insider under s 89E(1)(b) of the SIA 'knows or ought reasonably to know that the information is not generally available'.

[120] Likewise with respect to the 'price-sensitive' nature of the information, the SC needs to prove that the information on 'becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities'. Therefore 'knowledge' of both the fact of the information being 'not generally available' and its 'price-sensitive' nature would have to be proved either by direct evidence or circumstantial evidence via deduction, inference or conclusion from available facts.

[121] Then there is the essential element of 'acquire or dispose of securities' which may be done either by way of a self-made act or a specific instruction to one's agent or a standing instruction, all of which require mens rea. If someone has unlawfully used or hijacked the trading account of the insider, that could not be said to be the act of the insider and hence the mens rea element is absent.

...

[123] The mischief that the amendment sought to overcome was more than plain and obvious. It was to do away with the requirement to prove 'improper use of the information'. The Legislature could have used the device of an 'irrebuttable presumption' or 'deeming' provision but in this case the same effect could be efficiently had in terms of proving the elements of the offence by the device of redefining it by taking away the need to show or prove 'improper use of information'. (Emphasis added.)

[69] I entirely agree with the above pronouncements of the High Court and Court of Appeal on the mental element that is required to be established for a breach of that insider trading prohibition under s 89E(1)(b) of the SIA. In 1998, the Malaysian Parliament amended s 89 and revamped our insider trading laws. Specifically, Parliament removed the element of 'improper use of information'. Thus, the post-amendment s 89E does not require the plaintiff to establish 'improper use of information'. The clear words of s 89E(1)(b), when interpreted in its contextual historical antecedents, and its development from the original pre-1998 provision to the post-1998 amendment insider trading regime, shows that for either criminal or civil liability to arise under s 89E of the SIA:

(a) the offending insider must be:

(i) in possession of not generally available price-sensitive information; and

(ii) during that material period had made an acquisition or disposal of shares in the company, the subject of the information;

(b) it is not one of strict liability, in that it requires the mental element of knowledge, ie that the insider 'knows or ought reasonably to know' that the information is not generally available to the public; and

(c) importantly, it does not require proof of 'intention to use' or 'improper use' of the information.

Thus, I do not find any merit in the submissions of learned counsel for the defendant that the courts should reintroduce the element of 'intention to use' the inside information as an additional element of s 89E of the SIA.

[70] The Malaysian insider regulations regime is very much based on the Australian law on the subject. The learned author of the *Capital Market Laws of Malaysia* (2nd Ed, LexisNexis 2020), Ms Shanti Geoffrey, draws attention at p 182 to the connection between our laws on insider trading to that of Australia, which reiterate the above principle:

> Malaysia's laws insider trading are modelled after the Australian provisions, currently contained in sections 1043A to 1043O of the Australian Corporations Act 2001. While there are some differences, the main feature of the framework on insider trading regulation is that the conduct is regulated not on the basis of any special relationship between the person in possession of the information and the company whose shares are dealt in but on the principle that any person in possession of material, non-publicly available information should not be trading while in possession of that information.

[71] Given the similarity, case authorities from Australia are highly persuasive. One such case is *R v Peter Charles Pritchard Farris* [2015] WASC 251, where the Supreme Court of Western Australia discussed the mental element for insider trading prohibition and held that it does not require proof that the offender consciously traded using the inside information:

> The effect of s 1043A is to create a class of persons who by reason of their possession of Inside Information are prohibited from trading: *Mansfield v R; Kizon v R* (2012) 247 CLR 86; (2012) 293 ALR 1; (2012) 91 ACSR 1; [2012] HCA 49. If a person possesses information, that he knows is not generally available and is price sensitive, the prohibition on trading will apply whether or not he consciously brings to mind that information and its nature at the time he makes a decision to trade in shares. The reason for the alternative between 'knows' and 'ought to know' is not to deal with lapses of memory or a failure to recall the true nature of the information possessed but to deal with the situation where a person possesses inside information and fails to appreciate that it is not generally available or price sensitive where the objectively available circumstances should have led them to that conclusion.

[72] Similar pronouncement was made by the Supreme Court of New South Wales in *R v Rene Walter Rivkin* [2004] NSWCCA 7 where the court held that it was not necessary to prove, as an element of the offence, that the offender traded on the shares because of his possession of the inside information.

[73] Now, our law is similar to that pronounced in *Farris* and *Rivkin,* in that, the mental element for insider trading prohibition does not require proof of the defendant having consciously traded using the inside information. We have departed from that requirement with the amendment to the SIA, which I had alluded to earlier. In short, there is no longer a requirement for the element of intend to use the information to be proven in order to establish a breach of s 89E(1)(b) of the SIA.

[74] Learned counsel for the defendant placed high reliance on the Singapore High Court decision in *Public Prosecutor v Ng Chee Kheong* [1999] 4 SLR 56; [1999] 2 SLR(R) 1176 to argue that the element of 'intend to use' is a necessary ingredient of insider trading. In *Ng Chee Kheong,* the directors were charged with insider trading. An issue that arose for determination was whether an offence of insider trading is one of strict liability. The Singapore High Court held that insider trading was not a strict liability offence on the basis that mental element is presumed to be a necessary ingredient unless there are clear words to indicate the contrary. And thus, the Singapore High Court held that it was necessary for the prosecution to prove that the accused insider intended to use the information. After this decision, the Singapore Parliament added s 200 to their Securities and Futures Act 2001 to legislatively provide that it is not 'necessary for the prosecution or plaintiff to prove that the accused person or defendant intended to use the information'.

[75] The High Court judge rejected the defendant's reliance on *Ng Chee Kheong* on the basis of the difference of underlying philosophies of the regulatory regimes in Malaysia and Singapore. This is found in para 64 of the grounds of judgment:

> [64] A further point that may be made is that the Singaporean provision considered by the court in *Ng Chee Kheong* is premised upon the fiduciary theory of insider trading (which has been explained at paras 29–30), whereas the Malaysian provisions are based upon the principle of parity of information, which I have referred to as the market integrity theory (the Singapore Court of Appeal in *Lew Chee Fai Kevin v Monetary Authority of Singapore* referred to these as the person-connected regime and the information-connected regime, respectively (para 52). If the underlying philosophies of the two regulatory regimes are different, it follows therefore that any discussion of legislative intent cannot be adopted unthinkingly from one to the other.

[76] The Court of Appeal also considered this argument in some detail

before rejecting it:

> [142] Learned counsel for the appellant tried to convince us to follow the route taken in *Public Prosecutor v Ng Chee Kheong & Anor* [1999] SGHC 204 where Yong CJ sitting in the High Court held:
>
> > In my view the mens rea required for an offence of insider trading under s 103 is an intention to use the undisclosed information knowing that the information was price-sensitive and unavailable to the public. However the test to be applied as to whether an accused person possessed such knowledge at the time he made the trade is an objective test. The respondents reasons for making the trade must be tested objectively.
>
> [143] Singapore Parliament sprang into action to specifically legislate that intent to use insider information was not a necessary ingredient for the offence of insider trading. This was acknowledged by the Singapore Court of Appeal case of *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 when it observed as follows:
>
> > Our parliament has made it clear that s 220 was enacted to legislatively overrule the decision in *Public Prosecutor v Ng Chee Keong & Anor* [1999] 4 SLR 56; [1999] 2 SLR(R) 1176, which required proof of an 'intent to use' the inside information for insider trading (see Singapore Parliamentary Debates (5 October 2001) at cols 2137 and 2138). There is therefore no longer any requirement of proving the mens rea to use inside information in order to prove a contravention of either ss 218 or 219 of the SFA.
>
> [144] Thus s 220 of the Securities and Futures Act of Singapore reads:
>
> > 220 Not necessary to prove intention to use
> >
> > (1) For the avoidance of doubt, in any proceedings against a person for a contravention of section 218 or 219, it is not necessary for the prosecution or plaintiff to prove that the accused person or defendant intended to use the information referred to in section 218(1)(a) or (1A)(a) or 219(1)(a) in contravention of section 218 or 219, as the case may be.
>
> [145] We do not have the baggage associated with a decision like the Singapore case of *Public Prosecutor v Ng Chee Kheong* and so we do not have to get our Parliament to legislatively overrule such a decision. *Our position is more consistent with the Australian approach and interpretation as our Insider Trading provisions are very similar to the Australian Corporation Act provisions*.

[77] For the reasons advanced by both the High Court and Court of Appeal, I agree that the Singapore case of *Ng Chee Kheong* is of no relevance to the interpretation of s 89E of the SIA. Our insider trading regime is indeed more in sync with the Australian approach.

Answer to leave question No 1

[78] Thus, I would answer leave question No 1 in the negative and state that

s 89E of the SIA (now s 188 of the CMSA) does not create a strict liability offence. Instead, s 89E(1)(b) of the SIA (s 188(1)(b) of the CMSA) requires that an accused or defendant knows or ought reasonably to know that the information in question was not generally available. This knowledge of the accused or defendant constitutes the mens rea element of the insider trading prohibition and courts would have to determine this objectively based on the available evidence.

SECOND ISSUE — MATERIALITY

[79] The materiality issue deals with the relevant point in time at which a court is required to assess whether information in the possession of the insider is material for the purposes of determining any transgression under s 89E of the SIA, taking into account the definition of materiality in s 89B of the SIA that reads:

> 89B Material effect on price or value of securities.
>
> For the purposes of this Division, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to such information which would or would tend to, on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities.

[80] In the present case, both the High Court and Court of Appeal were of the view that 'materiality' may be determined by looking at post-acquisition condition relevant to the trade. The Court of Appeal accepted the High Court's finding that preferred the evidence of the plaintiff's expert who had evaluated the materiality of the information in the announcement post-acquisition rather than the materiality of the information that the defendant possessed merely at the time of the impugned acquisition. This was also the approach taken by another High Court in *Suruhanjaya Sekuriti Malaysia v Chan Soon Huat* [2018] 9 MLJ 782.

[81] Learned counsel for the defendant submits that this approach is incorrect, and argues that instead, the court should assess 'materiality' at the point in time when the two tranches of the impugned acquisition of shares were made by the defendant. Further, learned counsel for the defendant submitted that given the similarity in language between the Singaporean and Malaysian provisions on materiality, the Singapore case of *Lew Chee Fai Kevin* ought to be followed. In *Lew Chee Fai Kevin,* it was held that the relevant point in time for assessment of materiality would be the time of the impugned trading. I am, with respect, unable to accept that contention. On the issue of materiality of the information, the court may consider facts and circumstances at the time

and after the time of any impugned acquisition. Various authorities support this view.

[82] A case in point is the decision of the Supreme Court of Canada in *Sharbern Holdings Inc v Vancouver Airport Centre Ltd* [2011] SCJ No 23 (SC), where in assessing the materiality of a false statement in a disclosure statement had this to say:

> 57 As I have explained, the question of materiality involves the application of a legal standard to a given set of facts. ...
>
> 58 ... *The Court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available*. This is a fact specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.
>
> 59 *In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision ... The next step in determining whether an omitted fact or information (the 'omitted information') would be considered as significantly altering the total mix of information made available is to consider the omitted information against the backdrop of what was disclosed. ... As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information*. ...
>
> 60 *Another type of evidence relevant to the materiality assessment is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations ('behaviour evidence')*. ... Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.
>
> 61 In sum, the important aspects of the test for materiality are:
>
> i. *Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor*;
>
> ...
>
> iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and
>
> v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the

materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

[83] The High Court in *Suruhanjaya Sekuriti Malaysia v Chan Soon Huat* [2018] 9 MLJ 782; [2017] CLJU 2175 followed the materiality test enunciated in *Sharbern* that clearly recognises that 'materiality' may be determined by looking at post-event information. In that case, the High Court in determining the issue on materiality of information in the context of insider trading under s 89E of the SIA took the following approach:

> J. The materiality of the inside information
>
> [75] The inside information obtained by the defendant must be material information for the general public. It means that with the information, if it is available to the general public, the price of the particular securities ie WCT shares and warrants would have a significant change when it is traded in the open market. A cancellation of a major contract or project, if it is known to the general public, more likely will both result in the price of the securities to be largely affected and affecting the general public's decision to trade on the securities.
>
> [76] There is no need for a complex and elaborate formulation of what constitute material information. The facts of this case show that the information is material, otherwise the defendant would not have sold a huge chunk of his securities on a short span of time. This court takes the approach that determining the materiality of the information must not be determined only by looking at the possible reaction of the public, but it can also take into account the very conduct of the defendant in this case. The information is material depending on the facts of each case. This court have considered the totality of the evidence in the conclusion that the information is indeed material including by considering the action of the defendant himself in disposing the securities.
>
> ...
>
> [118] Hence it is wrong to argue that 'materiality' is to be assessed based on information only as at the date of the alleged inside trade.
>
> [119] Applying the *Sharbern* test, the court may properly consider 'subsequent behaviour evidence', that is to say, the potential behaviour of the hypothetical reasonable investor (ie persons in the same or similar situation as the reasonable investor on 30 December 2008) who has alongside with the announcement of the cancellation notice, the OSK analysis (the 'subsequent event') when making his decision to trade on the WCT securities.
>
> [120] *The Sharbern test clearly recognizes that 'materiality' may be determined by looking at post-event information*, in this case, information occurring after the date of the cancellation notice.

[84] Similarly, in *Securities Commission Malaysia v Toh Kai Fatt* [2023] 10 MLJ 670 the High Court took a composite approach and looked into the totality of the evidence in construing whether the information was material for

the purposes of civil claim arising from the transgression s 188 of the CMSA, and held as follows:

> [205] The contention by learned counsel for the defendant is premised on his interpretation of the words 'on becoming generally available' in s 185 to mean the actual date when the information becomes generally available — in this case, the date of the announcement. This, however, is not how I construe s 185.
>
> [206] To my mind, the words 'on becoming generally available' in s 185 do not refer to the time when the information actually 'becoming generally available' but instead refer to the court positing the effect of the information 'on becoming generally available' at the time the information was disclosed or communicated. This explains why the section refers to a determination as to whether such information on becoming generally available 'would or would tend to have' a material effect on the price or value of securities. In other words, *the court is required to posit based on the information 'on becoming generally available' as opposed to the court looking at any actual impacted price or value of the shares or actual influence of reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities*.
>
> [207] *Accordingly, as long as this court is satisfied that at the time the inside information was communicated to the defendant and in positing the effect of such information on becoming generally available at the time the inside information was communicated, if such information would or would tend to influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities, this would suffice to constitute 'material' information*.
>
> [208] Thus, while the difference between the price of the shares immediately prior to and immediately post the announcement is a fact that may be looked at by the court as support of its conclusion that the information is material, this is not and in fact cannot in law to be treated as the legal test to determine 'materiality' of the information. If this were so, it will be very easy to avoid a claim for insider trading for the insider could trade on the inside information, sell and make a gain from the same and then take steps to make the information to be generally available before the announcement. This will result in the announcement having minimal impact on the price of the impugned shares, thereby dispelling any 'materiality' to the information.

[85] Having looked at the approach taken in *Sharbern*, and the two High Courts in *Suruhanjaya Sekuruti Malaysia v Chan Soon Huat* and *Securities Commission Malaysia v Toh Kai Fatt* in construing the materiality of the information, I am of the considered view that the approach taken in these two High Court cases in determining materiality is the correct one. Materiality is a question of mixed law and fact, which is to be determined objectively from a reasonable investor's perspective. And in so doing, regard must be had to the statutory definition of materiality in s 89B of the SIA, and the facts and circumstances prevailing at the time when the information was conveyed to or obtained by the insider. This would include the effect that such information

would have on becoming generally available at the time the inside information was communicated and whether it would have generally affected investor behaviour in respect of the shares or securities in question.

[86] Additionally, in determining the materiality of the information, the court ought not be focusing only at the possible reaction of the public to that information when it becomes available to the public, but also consider the very conduct of the insider, such as was done by the High Court in this case, which approach was approved by the Court of Appeal. This, I find, is the correct approach; and for these reasons I am disinclined to follow the Singapore decision in *Lew Chee Fai Kevin*.

[87] There are also highly persuasive authorities from Australia, given the similarities in our insider trading regime, that have considered events and circumstances that had occurred after the impugned transaction, such as price movements of the relevant securities after the information is made public, as proof of materiality. This would include the cases of *R v Robert Bart Doff* [2005] NSWCCA 119; *R v Simon Gautier Hannes* [2000] NSWCCA 503; and *R v Rene Walter Rivkin* [2004] NSWCCA 7. Similarly, in our case the evidence of price surge of Worldwide shares after the announcement, a post-acquisition event, supports the finding of materiality of the inside information made by both the High Court and Court of Appeal, and that finding is without blemish. The inside information in the defendant's possession at the material time, is without doubt, that which 'would or would tend to influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities'. This, in my view would suffice to constitute 'material' information.

[88] Thus, having regard to the above authorities, I agree with submissions of learned counsel for the plaintiff that in determining the materiality of information in the possession of an insider, as defined in s 89B of the SIA, the court is at liberty to consider facts and circumstances at the time and also after the time of any impugned acquisition. Hence, the defendant's argument is entirely misplaced. Materiality is not based on information solely as at the date of the alleged inside trade. Materiality can be looked at by reference to post-event information, including post-event price sensitivity of the information, which is a clear indication of the information's materiality. Thus, whether the information is material for a breach of s 89E would very much depend on the facts and circumstance of each case, however, the determination of it must be based on the approach stated above.

Answer to leave question No 2

[89] Thus, in summary, the following is the answer to leave question No 2: In determining the materiality of information in the possession of an insider, as defined in s 89B of the SIA, the court shall not merely confine itself to the facts and circumstances occurring at the time of any impugned acquisition or trade of the securities, but also take into consideration the facts and circumstances after the time of the said impugned acquisition or trade.

CONCLUSION

[90] My learned sister Hasnah bt Dato' Mohammed Hashim CJM, and learned brother Abdul Karim bin Abdul Jalil FCJ, have read this judgment in its draft and concur with the same and they have agreed that it be made part of the judgment of the court. In the premise of the foregoing, the appeal is dismissed with costs. The judgment of the Court of Appeal is affirmed.

Appeal dismissed; decisions of the courts below affirmed.

Reported by Ashok Kumar